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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-283

GEORGE E. MAHIN, AS DIRECTOR OF REVENUE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

TERRANCE R. MITCHELL, ASALEE LABORN, ERNEST J. NASSOS, JOHN A. PETERSON AND FREDERICK W. WENDNAGEL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OPINIONS BELOW.

The order of the Circuit Court of Cook County, Illinois, Law Division, was entered on January 19, 1971, and the opinion of that Court was filed on February 4, 1971. The order and opinion are not reported, but are printed in their entirety in the Appendix to the Petition. The opinion of the Illinois Supreme Court is reported in 51 Ill. 2d 452, 283 N. E. 2d 465, and is also printed in the Petition.

JURISDICTION.

The claimed jurisdictional requisites are adequately set forth in the Petition. The respondents do not believe that the Court has jurisdiction under 28 U. S. C. § 1257(3).

QUESTION PRESENTED.

Does this Court have jurisdiction to review a state court's construction of a state act

(a) Where the state court expressly denied that its construction was compelled by an interpretation of the United States Constitution;

(b) Where the review of the state court's decision would not be preliminary to the consideration of a substantial federal question?

STATEMENT OF THE CASE.

Since we believe that petitioner's statement of the case does not adequately set forth the facts necessary to understand the issues, we undertake to restate some of the facts.

In *Thorpe* v. *Mahin*, 43 Ill. 2d 36, 250 N. E. 2d 633 (1969), the Illinois Supreme Court held the Illinois Income Tax Act to be constitutional and in so doing construed the Act, stating at 49-50:

> "It is next urged that the stated subject of the Act is income and the Act either fails to express its subject at all or embraces more than one subject in violation of section 13 of article IV of the constitution, and further provides for taxation of property without including that subject in the title of the Act. This is predicated upon the holding in *Bachrach* that an income tax is a property tax within the meaning of section 1 of article IX. In the view we have taken of the *Bachrach* case this point has no validity. But, it is further suggested that even if *Bachrach* is overruled, a problem remains in section 13 of article IV because unrealized capital appreciation accruing prior to the effective date of the Act is property, not income. This poses no problem as will presently appear.
>
> "Petitioners argue that if the Act is to be applied to the realization of increased value of capital assets accruing prior to August 1, 1969, they would thereby be deprived of property without due process of law and be denied equal protection of the law. For the reasons hereafter given, we consider the legislative intent to be that, in the computation of capital gains and losses, the value of property acquired prior to August 1, 1969, shall, for the purpose of computation of gains or losses be limited by its value determined as of August 1, 1969."

When the Illinois Department of Revenue subsequently issued instructions and regulations limiting the August 1, 1969 valuation date to property described in Section 1221 of

the Internal Revenue Code of 1954, the present suit was brought to challenge the Department's interpretation of the Act. That interpretation limited the application of the August 1, 1969 valuation date. In addition it raised for the first time the question of whether income earned and received by respondents Mitchell, Laborn and Nassos prior to August 1, 1969 was subject to a tax imposed solely upon the privilege of earning and receiving income after July 31, 1969. (Section 201, Illinois Income Tax Act.)

On appeal from a trial court decision holding in favor of the plaintiffs, the Director of Revenue of the State of Illinois, petitioner herein, urged the Illinois Supreme Court to overrule *Thorpe* and to hold that the Act should be construed so as not to apply an August 1, 1969 valuation date to any assets, and to impose a tax on income earned and received before August 1, 1969 if reportable for federal tax purposes after July 31, 1969.

Affirming the trial court and adhering to its determination of legislative intent in *Thorpe*, the Illinois Supreme Court stated, *Mitchell* v. *Mahin*, 51 Ill. 2d 452, 283 N. E. 2d 465 (1972):

> "The defendant's argument obviously presumes that in *Thorpe* we felt compelled to find a legislative intent to establish an August 1, 1969, valuation limitation in order to avoid constitutional problems which might stem from making the income tax applicable to appreciations in value occurring before August 1, 1969. *Thorpe* was decided without reaching the question of whether retroactive application rendered the Act unconstitutional, and the language to which defendant refers is clearly a discussion of the divergent and conflicting decisions on the subject and not a holding of this court with respect to the issue." 51 Ill. 2d 45 at 455-456.

Likewise, the Illinois Supreme Court in this case did no decide whether retroactive application would render th Act unconstitutional.

ARGUMENT.

I.

THE DOCTRINE THAT THIS COURT CANNOT BE DEPRIVED OF JURISDICTION TO DECIDE A SUBSTANTIAL FEDERAL QUESTION BY A STATE COURT'S RESTING ITS DECISION SOLELY ON AN UNSUPPORTED STATE GROUND HAS NO APPLICATION TO THIS CASE.

Petitioner argues that the Illinois Supreme Court's determination of the intent of the Illinois Legislature was without support. He then relies upon the doctrine that this Court cannot be deprived of jurisdiction to decide a substantial federal question by a state court's resting its decision solely on an unsupported state ground.

We do not, of course, challenge the validity of that doctrine. A state court cannot, for example, prevent an appeal being carried to this Court to review a substantial question of due process by resting its decision solely on an unsupported state procedural ground, *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449 (1958).

An examination of the briefs submitted to the Illinois Supreme Court in *Thorpe* and in this case, and of the decisions in both cases, would reveal that there was, indeed, substantial support for its determination of legislative intent. Nonetheless, without regard to that, and without regard to the fact that the doctrine has never been applied to a state court decision, like that of the Illinois Supreme Court here, as to substantive, rather than procedural, state law, the doctrine on which petitioner relies has no application here.

Under the doctrine, the unsupported state ground is brushed aside to permit the petitioner to submit to this

Court for consideration a substantial federal question which was not, but should have been, decided by the state court.

Here, while the petitioner argues the federal constitutional question which the Illinois Supreme Court did not decide—whether or not the taxation of pre-August 1, 1969 gains would violate due process requirements—he does not ask this Court to decide that question, other than in the context of an alleged constitutional compulsion, which is discussed in the next section of this brief, or argue that the resolution of the question was evaded in order to deprive this Court of jurisdiction.

Since the Illinois Supreme Court held the Illinois Income Tax Act constitutional, there would be no need to resolve the undecided due process question unless petitioner challenged the constitutionality of the Act as construed. Plainly, that he does not do. There is, therefore, no dispute between the parties as to the constitutionality of the Act as construed by the Illinois Supreme Court.

What petitioner seeks in this Court, in reliance on cases which state the principle that this Court's jurisdiction to decide substantial federal questions may not be defeated by a state court putting forward nonfederal grounds of decision which are without fair or substantial support, is a decision that the Illinois Supreme Court's construction of the Illinois Income Tax Act was wrong, not as a preliminary to considering a substantial federal question, but as an end in itself. Certainly this Court has no jurisdiction to render such a decision. *Chicago, Rock Island & Pacific Ry.* v. *Maucher*, 248 U. S. 359 (1919); *Palmer* v. *State of Ohio*, 248 U. S. 32 (1918); *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649 (1942).

II.

THE STATE COURT DECISION WAS NOT COMPELLED BY AN ERRONEOUS VIEW OF THE FEDERAL CONSTITUTION.

Where a state court decision on state grounds is compelled by the court's interpretation of the United States Constitution, and where there is substantial reason to believe that the interpretation may have been incorrect, this Court, as petitioner urges, has entertained jurisdiction to consider the underlying federal question. *State Tax Commission* v. *Van Cott,* 306 U. S. 511 (1939); *Minnesota* v. *National Tea Co.,* 309 U. S. 551 (1940); *Perkins* v. *Benguet Consolidated Mining Co.,* 342 U. S. 437 (1952).

This Court has, however, never undertaken to review a state court decision on state grounds when the state court did not decide the potential federal question and expressly stated that its decision on state grounds was not compelled by any view as to the federal question. It should not do so here.

III.

THIS COURT HAS NO JURISDICTION TO RESOLVE A CONFLICT BETWEEN STATE COURTS ON MATTERS OF STATE LAW.

Petitioner argues that other states have construed similar state income tax acts differently.

Needless to say, that difference as to state law does not confer jurisdiction on this Court to enter the controversy, however desirable uniformity among state laws may be.

There is no conflict between the Illinois Supreme Court and other states on the question whether the retroactive application of an income tax act violates due process re-

quirements, because, as recognized by the Connecticut Supreme Court in *Kellems* v. *Brown, Tax Commissioner* (Supp. Br., A1), the Illinois court did not decide that question.

CONCLUSION.

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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